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In the Supreme Court of the United States

OCTOBER TERM, 1969

RIDGEWOOD MANAGEMENT COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-30) has not yet been officially reported. The Board's decision and order (Pet. App. 1-26) are reported at 171 NLRB No. 31.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1969 (Pet. App. 27-30), and a petition

for rehearing was denied on May 13, 1969 (Pet. App. 31). The petition for a writ of certiorari was filed on June 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the employer promulgated and enforced a rule barring solicitation of union membership during working hours solely for the purpose of impeding its employees' union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

In February, 1967, the Union [1] began a campaign to organize the petitioner Company's employees (R. 70; J.A. 15-16, 27).[2] Clay Kinnaird, the president and general manager of the Company, held a meeting with some of the employees on March 14 and questioned the employees about their union activities

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[1] Hotel, Motel, Restaurant and Club Employees Union, Local 750, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

[2] "R." refers to the transcript of record, and "J.A." to the Joint Appendix, in the court below.

(R. 70-71; J.A. 7-8, 18, 30, 38-39). He insisted that none of them would be allowed to leave until he "got to the bottom" of the union problem. Kinnaird also stated that those who belong to unions are "nothing but poor white trash or scum" (R. 71, 72; J.A. 9, 19, 31).

On March 27, the Union filed a petition for a representation election and, on April 24, the Company and the Union entered into a stipulation for certification upon consent election (R. 68). The day after the stipulation, the Company posted the following notice:

> ALL EMPLOYEES TAKE NOTICE:
>
> No Employee of Ridgewood Motor Hotel is Permitted to Solicit Union Membership During Working Hours on the Premises of Ridgewood Motor Hotel [R. 78; J.A. 9]

Prior to the posting of the notice, the Company had no rule against solicitation, and employees and supervisors had been permitted during working hours to conduct solicitations frequently, openly, and without restriction in the public areas of the motel (R. 78; J.A. 12-13). Such solicitations included candy sales, cake sales, contributions for departing employees, flowers for the families of deceased employees, church donations, football pools, and Christmas gifts for supervisors (R. 79; J.A. 13-15, 24-26, 32-33). In addition, outside salesmen were permitted to visit and sell various commercial articles to employees during working hours (R. 79; J.A. 13-15, 24-26).

During the time the no-solicitation rule was in effect, it was enforced (R. 79; J.A. 43). At the same

time, however, the resident manager and a labor relations consultant held interviews with the employees during working time, in an effort to persuade them that a union was not necessary (R. 81; J.A. 11-12, 49-51). The no-solicitation notice was removed from the bulletin boards on May 19, the day the Union lost the Board election (R. 79; J.A. 47).

The Board adopted the Trial Examiner's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees concerning their union activities, and by promulgating and enforcing the no-solicitation rule solely for the purpose of impeding the Union's attempt to organize its employees (Pet. App. 6, 11-12). Accordingly, the Board ordered the Company to cease and desist from the unfair labor practices found, to rescind the no-solicitation rule, and to post appropriate notices (Pet. App. 20-23).[3] The court of appeals sustained the Board's findings and enforced its order (Pet. App. 27-30).

ARGUMENT

1. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 803, n. 10 (1945), this Court recognized that a rule barring union solicitation during working time, while presumptively valid, violates Section 8(a)(1) of the Act if adopted for a discriminatory purpose. Here the Board found that the Company's no-solicitation rule "was designed

[3] In addition, because of the unlawful no-solicitation rule, the Board set aside the May 19 election which the Union had lost (Pet. App. 18).

to stifle the Union's campaign to organize the employees and was not necessary to maintain efficiency, order, or discipline" (Pet. App. 11). Thus, the only question actually presented is whether the court of appeals properly found substantial evidence to support the Board's finding. Such an issue does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951); *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951). Moreover, the Board's finding of unlawful purpose is clearly justified by the evidence (see Pet. App. 12) that the rule was imposed at the outset of the Union's campaign and was annulled as soon as the Union lost the election, that the Company openly and freely permitted other solicitations by employees and outside salesmen during working hours, and that the Company, while barring union solicitation, utilized the employees' working time to conduct an anti-union campaign.[4]

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[4] Contrary to petitioner's assertion (Pet. 8), the Board did not find that the Company's use of its premises for that purpose constituted an independent violation of Section 8(a)(1) of the Act; it merely took that factor into account in assessing the motive for the no-solicitation rule. The cases relied on by petitioner (Pet. 7-8) are factually distinguishable. Thus, in *TRW, Inc.* v. *National Labor Relations Board*, 393 F. 2d 771 (C.A. 6, 1968), the court found that "the evidence as a whole shows that the company guarded its working time carefully and exceptions to its no solicitation policy were made sparingly," and that the permitted solicitation "was strictly limited both as to time and designated periods during the year in order not to interfere with production" (p. 774); moreover, the employees were "free to converse on any subject during breaks and lunch periods," and assured that "no malice or

2. There is no merit to petitioner's contention (Pet. 4-7) that the court below erred in failing to consider whether the no-solicitation rule actually interfered with the Union's ability to communicate with the Company's employees. Where, as here, a no-solicitation rule has been promulgated for an unlawful purpose, the fact that the Union may have had available other avenues of communication is irrelevant. There is no occasion to consider the apparent conflict between such cases as *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F. 2d 128 (C.A. 2, 1963), certiorari denied, 376 U.S. 951,[5] and *National Labor Relations Board* v. *Rockwell Mfg. Co.*, 271 F. 2d 109 (C.A. 3, 1959), for those cases differ from the instant case in that they involve instances in which the no-solicitation rule was not discriminatorily motivated.[6] Similarly, *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357 (1958) dealt only with the "very narrow and almost abstract question" (357 U.S.

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prejudice" would result from their union activity (p. 772). And, in *Serv-Air, Inc.* v. *National Labor Relations Board*, 395 F. 2d 557 (C.A. 10, 1968), the "rule was in effect for at least three and one-half years before any complaint was made" (p. 560).

[5] Accord, *Republic Aluminum Co.* v. *National Labor Relations Board*, 394 F. 2d 405 (C.A. 5, 1968); *United Steelworkers* v. *National Labor Relations Board*, 393 F. 2d 661 (C.A. D.C., 1968).

[6] In any event, *Rockwell* can be explained on its special facts; i.e., the employer's no-distribution rule was promulgated six years before the dispute, it "was premised on its desire to 'serve production, order and discipline,'" and the employer "enforced its no-distribution rule to maintain order." 271 F. 2d at 116.

at 362) whether an employer who validly adopted a no-solicitation rule commits an unfair labor practice by enforcing the rule against employees while he himself engages in anti-union solicitation; here, the rule itself was found to be invalid.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[7] The other cases cited by petitioner (Pet. 6) are likewise distinguishable. *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 (C.A. 6, 1965), concerned the validity of a provision of a collective bargaining agreement barring an outside union from distributing literature in the plant. And, *May Department Stores Co.* v. *National Labor Relations Board*, 316 F. 2d 797 (C.A. 6, 1963), like *Steelworkers, supra*, involved a lawful no-solicitation rule.

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